EMPLOYMENT TRIBUNALS

Claimant: Mr A Korniak

Respondent: National Association of Citizens Advice

Heard at: London Central

On: 1 and 2 October 2020

Before: Employment Judge Khan
Mrs H Cook
Mr J Ballard

Representation
Claimant: In person
Respondent: Mr T Barry, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claim fails and is dismissed.

REASONS

1. By an ET1 presented on 6 February 2020 the claimant brought a claim of disability discrimination. The respondent resists this claim.

The issues

2. We were required to determine the following issues which were based on the summary of the claim in the Tribunal's Case Management Order dated 5 June 2020 and clarified following discussion with the parties during the hearing:

   2.1 Disability

   The respondent concedes that the claimant was disabled at all relevant times, by reference to dyslexia, for the purposes of the Equality Act 2010 (EQA).

2.2 Direct discrimination (section 13 EQA)

2.2.1 The claimant complains of the following detriments:

a. The respondent gave him a shortlisting score which did not meet the acceptable minimum standard of 60%.
b. The respondent predetermined his application and therefore the outcome of the interview it offered him.

2.2.2 Was that less favourable treatment i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances?

2.2.3 If so, was this because of the claimant's disability?

2.3 Failure to make reasonable adjustments (sections 20 and 21 EQA)

2.3.1 It is agreed that the respondent applied the following PCPs to the claimant in relation to its online application form:

a. The questions which the candidates were required to answer were not set out in the application form.
b. There was limit of 200 words for each answer.
c. It was in written format only.

2.3.2 Did these PCPs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that they prevented him from being the strongest candidate and therefore from being appointed into the role he applied for.

2.3.3 If so, did the respondent know or could it reasonably have known the claimant was likely to be placed at such a disadvantage?

2.3.4 If so, were there steps that were not taken which could have been taken by the respondent to avoid any such disadvantage? The claimant relies on the following;

a. The application form was amended so that each question was set out on the same page as the corresponding answer.
b. No word limit for the answers provided.
c. The ability to submit audio files to support his application.

2.3.5 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

2.4 Victimisation (section 26 EQA)

2.4.1 It is accepted that the claimant did a protected act on 21 November 2019.

2.4.2 Was the claimant treated detrimentally because of this in that the claimant's application and interview outcome were predetermined?

The evidence and procedure

3. The claimant gave evidence himself.

4. For the respondent, we heard from: Jason Kay, formerly Interim Chief Technology Officer; and Rosalind Fane, Director of Planning, Performance and Projects. Mr Kay gave evidence via video-link using equipment provided by the respondent. There were no technical issues.

5. There was a hearing bundle of 221 pages. We read the pages to which we were referred.

6. We also considered oral closing submissions.

The facts

7. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

8. The claimant has dyslexia. This affects his ability to read and write as well as his memory, organisation, time-keeping, concentration, his ability to multi-task, and communicate. The respondent has conceded that this is an impairment which amounts to a disability for the purposes of the EQA.

9. The respondent is a national charity made up of a network of 279 local Citizens Advice members. It has 7,000 staff and over 21,000 trained volunteers.

10. The claim centres on the claimant's application for the role of Head of Technology Planning and Delivery on 18 November 2019.

<u>The application process</u>

11. There was a digital job pack for this vacancy which candidates could download from the respondent's website. The claimant had access to the following materials when preparing his application:

    (1) A webpage headed "Equality and Diversity at Citizens Advice" which stated that the respondent operated a Guaranteed Interview Scheme (GIS).

    (2) This included an embedded weblink to the GIS page on the respondent's website which explained that an eligible candidate was required to achieve a minimum score of 60% based on the essential criteria for the role to be guaranteed an interview under this scheme. This noted "If you wish to apply under the GIS, please indicate this in the relevant application form. Whether you are applying under the

scheme or not, if you are disabled we will ask you to let us know if you need any adjustments during each recruitment stage…"

(3) This also had an embedded weblink to the respondent's Recruitment and Selection Policy, section 4.3 of which provided "Our recruitment documents and forms can be provided in alternative formats…and we are happy to receive applications in alternative formats". This policy could also be accessed via the respondent's vacancy webpage.

(4) The respondent's Guidance Notes for Applicants was also accessible via the vacancy webpage. Under the heading 'Disability', this guidance also referred to the GIS and advised eligible candidates to complete the appropriate section on the application form. Candidates were also told to "use this section to let us know if you require any adjustments to be made to the shortlisting process or to provide any information you wish us to take into account when considering your application".

(5) This document also provided guidance on providing supporting information of the relevant experience, knowledge, skills and abilities for the role. Candidates were told that they needed to provide one relevant example from their recent work, or alternatively, from any other aspect of their lives, for each requirement (i.e. an essential or desirable criterion) in the person specification. This guidance referred candidates to the STAR answer format:

> Specific i.e. give a specific example
> Task i.e. briefly describe the task/objective/problem
> Action i.e. tell us what you did
> Results i.e. describe what results were achieved.

12. Although he was able to access these materials the claimant explained that because of his dyslexia he read only the information which he felt was necessary to complete his application. The claimant knew that the respondent operated a GIS. We find that he also knew, or ought to have known, from the materials he had been provided that he was able to ask the respondent to request adjustments to any stage of the recruitment process. This included requesting adjustments to the format of the application form. We also find that the section of the Guidance Notes for Applicants which related to the provision of supporting information and which the claimant read provided a clear explanation of what information was required and the optimal way to structure this information when completing his application form.

13. The claimant submitted his application form together with a covering letter and his CV on 18 November 2019. He spent four days completing these documents. He complains that the application format disadvantaged him because of his disability in three ways.

(1) The questions he was required to answer did not appear on the application form. Although we accept that claimant found this both frustrating and time-consuming, he was able to create a separate document in which he set out the questions and his answers which were cut and pasted into the application form.

(2) There was a limit of 200 words per answer. We accepted the claimant's evidence that because of dyslexia he found it more difficult to summarise and organise his answers.

(3) It was in written format. The claimant used voice-activated software to complete a working draft before cutting and pasting his final draft into the application form.

14. Although the claimant identified in his application form that he had a disability and that he wished to apply under the GIS he did not disclose what his disability was or how he felt it had affected his ability to complete the application form. Nor did he identify any adjustments to the application, shortlisting or recruitment processes. This meant that whilst the respondent was on notice that the claimant had a disability when it received his application, it had no actual knowledge of the claimant's dyslexia nor of any disadvantage which the claimant felt he had suffered as a result of the application format.

The shortlisting process

15. The scoring process and rationale was set out in the respondent's Guidance for Hiring Managers: How to shortlist your applicants for interview. A shortlisting manager was required to score all answers between 1 and 5. A score of 1 was applicable where no evidence had been provided i.e.

> "The applicant simply states that they have fulfilled the criteria / done the role without giving details of when or how".

At the other end of the scale, a score of 5 applied where the

> "Applicant demonstrates a thorough understanding of the issues at hand that is more to substantially more than the job requires…Overall, candidate's response is complete, addresses all aspects of the question and does not require probing. The applicant uses the 'STAR' structure, clear on the outcome / impact."

16. When a candidate applied under the GIS the hiring manager was required to mark the essential criteria only. These scores were converted to a percentage score out of 100. As noted, under the GIS a minimum score of 60% across all the essential criteria was required before an interview was guaranteed. The guidance also provided that any candidate who scored 1 in relation to any of the essential criteria was "unlikely to be appointable".

17. The shortlisting guidance provided that hiring managers should ensure that they were able to justify and provide evidence for their scoring by keeping an accurate note. This record was to be retained by the manager and provided to HR if there was a complaint or investigation.

18. When a candidate indicated that they were applying under the GIS two ticks would appear against their anonymised candidate number which the recruiting manager would see. No personal information about the candidate would be disclosed to a shortlisting manager at this stage.

19. The shortlisting process was conducted by Jason Kay, then Interim Chief Technology Officer, who was employed on a consultancy basis. Rosalind Fane, Director of Planning, Performance and Projects, was the second manager on the recruitment panel. Although she did not have a technology background Ms Fane was involved in this recruitment exercise because of a lack of senior capacity within the technology team. Mr Kay had written the job description and person specification for the role, and as the manager with relevant technical and industry experience took the lead in this recruitment process. It was agreed that Mr Kay would conduct the shortlisting process on his own. When he completed this exercise, on the morning of 21 November 2019, he told Ms Fane that he had shortlisted three out of a total of 37 candidates and none stood out.

20. The claimant was not shortlisted. He accepted, and we find, that Mr Kay did not know that the claimant had a disability when he rejected his application. Mr Kay had seen the two ticks icon against one of the anonymised candidate numbers but had not understood what this meant. This was because he had not received training on the respondent's online recruitment portal, JobTrain. Nor was he familiar with the respondent's shortlisting guidance for managers.

21. Although in his evidence to the tribunal Mr Kay said that his initial sift was based 85 – 90% on CVs and the remainder on the application forms, we find that he shortlisted all applicants based solely on their CVs. This was because in his near-contemporaneous correspondence with Ms Fane in relation to the claimant's application, Mr Kay referred only to a CV. He did not score any of the candidates. He explained that if it was clear from a candidate's CV that they lacked the relevant experience required for the role it was unnecessary to conduct a scoring exercise. He had therefore failed to comply with the respondent's shortlisting guidance on several counts. However, we find that he treated all the candidates in the same way. He assessed their CVs against the experience and background he felt was required for the role.

The claimant's protected act

22. Later that morning, on 21 November 2019, the claimant checked the status of his online application and saw that he had not been shortlisted. He was not only disappointed but suspicious. He felt he met the minimum criteria in that he had 23 years of related experience and was a subject matter expert. He had expected to be shortlisted. He sent two emails to the respondent later that day. In his first email he enquired about the criteria used to shortlist under the GIS. In his second he complained that he had been unfairly treated and discriminated against, and requested details of the respondent's complaints procedure. He did not refer to dyslexia in either email. The respondent conceded that this second email amounted to a protected act for the purposes of the EQA. Both of these emails were forwarded by Shakira Adegoke, an HR adviser, to Ms Fane, on the same date.

The decision to offer the claimant an interview

23. Upon receiving the claimant's first email querying the GIS criteria, Ms Fane emailed Mr Kay asking him to review his shortlisting decision to reject one of the candidates who had applied under the GIS, in the following terms:

> "If you think they do not meet the minimum criteria, please could you outline why, or happy to invite to interview? I actually think it looks like quite a strong application as he seems to have extensive experience of overseeing projects / programmes. The application is very thorough compared to some of them."

In asking Mr Kay to either evidence his decision to reject the claimant's application or reconsider whether to shortlist him for interview, Ms Fane's comments illustrated that she looked favourably on the claimant's application.

24. Mr Kay replied at 5.33pm when he explained that he had rejected all the candidates who "I do not feel fit the right criteria for the position and experience necessary." He agreed to review his decision in relation to the claimant. Ms Fane responded to say "we'll just need to give a clear rationale as to why we don't believe they meet the minimum requirements". This was a reference to the 60% GIS threshold. A decision had not been made. All that Ms Fane was doing was emphasing the need for Mr Kay to provide a clear rationale, if having reviewed his decision, the outcome remained the same. This what the respondent's guidance required.

25. Mr Kay sent another email to Ms Fane at 5.44pm to confirm that he was happy to interview the candidate under the GIS "to ensure we cover it off". We find that Mr Kay misunderstood that a candidate who applied under the GIS was automatically guaranteed an interview. He was unaware of the 60% threshold. He was not familiar with the GIS nor, as we have found, the shortlisting guidance. We also find that by "cover it off" Mr Kay meant *to comply with* what he understood to be a requirement of the GIS.

26. Having reviewed the claimant's CV, Mr Kay emailed Ms Fane at 9.46am the next morning. He explained that he was looking for someone with "specific skills around managing projects and programmes…and specific hands on experience rather than an IT leadership role" which he felt the claimant lacked, however, he remained willing to interview him "given there is a guaranteed interview". He remarked "I still do not think however this is the right person for the role given the specific skills i [sic] am looking for, but I could be wrong!" The claimant says that this illustrated unconscious bias by Mr Kay in that he had made assumptions about the claimant because of his disability. We do not find this to be the case. Mr Kay did not know what the claimant's disability was. Nor do we find that Mr Kay's view was in any sense related to the claimant's disability status. He assessed the claimant's employment background based on his CV. To the extent that Mr Kay had made assumptions these were based on the claimant's CV which he had made when he originally rejected the claimant's application before he knew that the claimant was disabled. As

he explained to Ms Fane, Mr Kay felt that the claimant's CV demonstrated that he lacked relevant hands-on experience.

27. Nor do we find that this demonstrated that Mr Kay had a closed mind. Whilst Mr Kay felt that the claimant lacked the requisite skills and experience on the basis of his CV, we find that he was prepared to be convinced by the claimant that he was the right candidate for the job at interview. As Mr Kay said in evidence, this interview would be an opportunity for the claimant to demonstrate that he had the right skills, knowledge and expertise for the role.

28. Ms Fane replied by email at 9.51am when she agreed that the claimant's CV was more indicative of leadership than hands-on roles, however, she felt that there was evidence of project / programme delivery. She suggested that the claimant was interviewed unless it could be demonstrated clearly that he did not meet the essential criteria. We find that this showed that Ms Fane was focused on establishing whether there were clear grounds for any decision not to shortlist the claimant which in her mind, remained an open question. We do not therefore find that Ms Fane had a closed mind.

29. At 10am Mr Kay emailed Ms Kay to agree that the claimant should be interviewed. Ms Fane then emailed Ms Adegoke to confirm that she and Mr Kane had agreed to interview the claimant. She queried whether he had requested any special arrangements for the interview. In her reply at 11.04am, Ms Adegoke suggested that Ms Fane should contact the claimant directly to explain that his application had been "re-reviewed" having not been initially shortlisted. Ms Adegoke explained that it was important to avoid appearing to ignore the concerns the claimant had raised in his two emails and of giving the impression that he had only been invited to the interview "due to the possibility of a complaint being made".

30. Ms Fane emailed Ms Adegoke at 12.02pm to ask for more information about the claimant's second email. We accept that this contemporaneous email is consistent with her evidence, which we accept, that she had not seen this email when Ms Adegoke forwarded it to her the previous day. In her witness statement, Ms Fane explained that she had overlooked this email because of the way in which the Google email system grouped emails together. We therefore find that neither Mr Kay nor Ms Kane knew about the claimant's protected act when they agreed to interview him earlier that day. We also find that Ms Adegoke, who had no input in this decision, was giving reasonable advice to Ms Fane. She understood, correctly in our view, that the decision to interview the claimant was unrelated to the claimant's threat to make a complaint and she was keen to ensure that the claimant understood this.

31. Before replying to Ms Adegoke, Ms Fane asked Mr Kay to conduct a retrospective scoring exercise of the claimant's application. As Ms Adegoke had emphasised, this was necessary because the claimant had queried the application of the shortlisting criteria. Ms Fane noted "We'll need to justify why he didn't meet 60% originally". She treated this as a separate consideration from the decision to interview the claimant which

had already been made. As Ms Fane wrote "I guess we'll need to explain why we didn't offer an interview in the first place, but now we are."

The scoring exercise

32. Mr Kay and Ms Fane completed the scoring exercise together during a Google Hangout call. We accept that this took around an hour and was completed by 12.38pm.

33. There were eleven essential criteria for the Head of Technology Planning and Delivery role. The claimant was given a score of 17 out of 55 which equated to 31%. He was given a score of 1 for six of the eleven answers marked.

34. There was no contemporaneous evidence for the rationale for these scores. The shortlisting document completed by Ms Fane included only the claimant's scores and no explanation in the spaces provided on the form for this purpose. She said that she would usually complete a spreadsheet and make concise notes for each candidate scored. She did not do this. She also said that it would be unusual to complete this information on the form because of the number of candidates being scored. Nor was there any contemporaneous record of their discussion because Mr Kay did not make a note of it, Ms Fane could not recall whether she had made one and no record was retained or filed with HR.

35. Ms Fane explained that this scoring process was consistent with the other times she had completed this exercise in that the shortlisting panel met and agreed on the same score which was then recorded. Although she and Mr Kay agreed on the claimant's scores if they had not then this scoring process meant that any areas of difference between the scorers would be erased. This did not, in our view, comply with the respondent's guidance which was that each scorer would record their own scores which would then be aggregated.

36. Notwithstanding these process defects, we accept the evidence of Mr Kay and Ms Fane that they conducted their assessment by applying the scoring criteria as set out in the guidance notes, which Ms Fane was familiar with, and did so by reference to the claimant's application form and not his CV. We accept the evidence they gave for their scoring rationale for the following reasons:

    (1) We find that the claimant's answers to the six questions for which he scored 1 (i.e. Qs 4, 5, 6, 7, 9 and 11) were generic and did not refer to specific examples of how and when he had met the essential criteria.

    (2) The claimant agreed with the score of 1 he was given for Q6.

    (3) Overall, we find that the claimant had not followed the guidance for applicants which was that only one structured example was required.

    (4) We were taken to Q1 for which the claimant was scored 3 and which demonstrated to us that Mr Kay and Ms Fane were prepared to give the claimant a higher score where they felt this was warranted.

37. At 12.45pm, Ms Fane sent a message to Ms Adegoke to update her that the claimant had not scored "anywhere near 60%" and she and Mr Kay no longer felt that he should be interviewed. We accept Ms Fane's evidence that she hesitated about how to proceed. Until this scoring exercise she had been consistent in her view that the claimant's application was thorough and his CV demonstrated some relevant experience and skills. It is likely that she was genuinely surprised by how far short of the 60% GIS threshold the claimant's application had fallen.

38. Ms Fane spoke again to Mr Kane at 1.40pm and also to Ms Adegoke, and they agreed to stand by their decision to interview the claimant. We accept Ms Fane's evidence that she felt on balance that this was the fair thing to do: she weighed up the effort the claimant had put into his application, his strength of feeling that he was qualified for the role and his CV, as well as his evident motivation to work for the respondent (Ms Fane was now aware that this was the claimant's second application) and she was also mindful of the process failures which the claimant's query about the shortlisting process had revealed. She was motivated in part to rectify this, despite the fact that Mr Kay's initial shortlisting decision in relation to the claimant had been borne out by the scoring which both managers subsequently conducted.

39. The 60% GIS threshold was not therefore applied to the claimant.

40. We also find that like Mr Kay, Ms Fane felt that by offering the claimant an interview he would have the chance to provide the specific examples which his application lacked. Although Ms Fane was now aware of the claimant's complaint, we find that neither she nor Mr Kay had predetermined the outcome of the claimant's interview once they agreed to stand by their original decision to offer him one. It was an offer which was genuinely made.

41. Ms Fane emailed the claimant later that day to confirm that he had not initially been shortlisted because he had failed to meet the 60% threshold based on the essential criteria "due to the fact that your responses did not provide sufficient examples of how you'd applied your knowledge and skills in practice". She explained that the respondent had reviewed his application and his CV, and agreed that he had relevant experience, and he was invited to an interview on 27 November 2019. She asked the claimant to confirm whether he needed any reasonable adjustments in relation to the interview.

42. Although Ms Fane's explanation was elliptical and therefore misleading, we find that she was following Ms Adegoke's advice to avoid giving the claimant the wrong impression that he had been offered the interview because of his complaint. As we have found, the interview offer was genuinely made and did not have a fixed outcome. However, Ms Fane's explanation had the undesired effect that it reinforced the claimant's suspicions about the selection process.

43. The claimant declined this offer by email on 25 November 2019. He did not accept or understand the explanation he had been given. He had lost trust in the respondent. He felt that this offer was insincere and an attempt

to avoid litigation. Whilst we have found that Ms Fane's explanation was misleading and likely to have reinforced the claimant's initial suspicions, we do not find that the claimant's view that there was foul play or collusion is borne out by the facts we have found. He therefore relinquished the opportunity he had been given to show the respondent that he was the best candidate for the role.

44. None of the three applicants who were interviewed by the respondent were appointed into the Head of Technology Planning and Delivery position.

The law

Direct discrimination

45. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

46. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (see O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor [1997] ICR 33, EAT).

47. It is self-evident that the decision-maker responsible for the impugned treatment must be aware of the protective characteristic relied on. In relation to a disability discrimination claim, the claimant must show that the employer had actual or constructive knowledge of the disability. This has three elements: (a) a physical or mental impairment which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities (see Gallop v Newport City Council [2014] IRLR 211).

Victimisation

48. Section 27(1) EQA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes B has done, or may do a protected act.

49. Section 27(2) EQA enumerates the four types of protected act as follows:

    (a) bringing proceedings under the Act (i.e. EQA)
    (b) giving evidence or information in connection with proceedings under this Act
    (c) doing any other thing for the purposes or in connection with this Act
    (d) making an allegation (whether or not express) that A or another person has contravened this Act.

50. As to causation, the tribunal must apply the same test to that which applies to direct discrimination i.e. whether the protected act is an effective or substantial cause of the employer's detrimental actions.

Detriment

51. Section 39(2)(a) EQA provides that an employer (A) must not discriminate against an employee of A's (B) by subjecting him to any other detriment.

52. A complainant seeking to establish detriment is not required to show that he has suffered an adverse physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL).

53. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

54. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Burden of proof

55. Section 136 EQA provides that if there are facts from the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

56. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must first establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination and something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA).

57. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal is in a position to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870).

58. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such a ground (see Igen Ltd v Wong [2005] IRLR 258, para 51).

Failure to make adjustments

59. The duty to make reasonable adjustments is set out in sections 20 – 21 EQA and in Schedule 8. Where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation

to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

60. Under Schedule 8, paragraph 20(1), an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled *and* is likely to be placed at a substantial disadvantage by the PCP, physical feature or, as the case may be, lack of auxiliary aid. A tribunal can find that the employer had constructive (as opposed to actual) knowledge both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. In this case, the question is what objectively the employer could reasonably have known following reasonable enquiry.

61. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not so disabled. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment.

62. The test for whether the employer has complied with its duty to make adjustments is an objective one, see Tarbuck v Sainsbury's Supermarkets [2006] IRLR 664. Ultimately, the tribunal must consider what is reasonable, see Smith v Churchills Stairlifts Plc [2006] ICR 524. The focus is the reasonableness of the adjustment not the process by which the employer reached its decision about the proposed adjustment.

63. The tribunal must also have regard to the guidance contained in the EHRC Code of Practice on Employment 2011 and in particular the following six factors it enumerates when considering the reasonableness of an adjustment:

    (1) Whether taking any particular steps would be effective in preventing the substantial disadvantage
    (2) The practicability of the step
    (3) The financial and other costs of making the adjustment and the extent of any disruption caused
    (4) The extent of the employer's financial or other resources
    (5) The availability to the employer of financial or other assistance to help make an adjustment (such as through Access to Work)
    (6) The type and size of the employer

Conclusions

Direct discrimination

64. This complaint fails. We have found that the respondent had neither actual nor constructive knowledge that the claimant had dyslexia. It did not know what the claimant's impairment was or the effect it had on him. Without this knowledge neither Mr Kay nor Ms Fane could have been either consciously or subconsciously motivated by it.

65. For completeness, had we been required to make findings in relation to the two detriments about which the claimant complains:

    (1) Scoring exercise: We would not have found that the shortlisting score was a detriment as it was not relied on by the respondent to reject the claimant's application. The claimant's application was initially rejected by reference to his CV and before any scoring exercise had been completed. Once it had been completed the respondent disapplied the scoring exercise and proceeded to offer the claimant an interview. This was an offer which we have found was made genuinely. Nor would we have found that the shortlisting score was a detriment because of our conclusion that neither Mr Kay nor Ms Fane form a fixed negative view of the claimant's suitability for the role because of the scoring exercise they completed.

    (2) Interview outcome: We have found that the interview which both managers agreed to offer the claimant did not have a predetermined outcome and neither manager had a closed mind. We have also found that Ms Fane felt that it was fair to offer the claimant an interview not least because the respondent had failed to comply with its own guidance. She looked favourably on the claimant's CV and his application form. She felt it was thorough and he had spent a lot of time on it. By this date she was also aware that this was the claimant's second application and she knew that the claimant was motivated to work for the respondent. Both Ms Fane and Mr Kay felt that the claimant would then have an opportunity to demonstrate his suitability for the role at interview. The claimant declined this offer because he had lost trust in the organisation.

    Victimisation

66. This complaint fails because we have found that the offer of an interview was genuinely made and its outcome was not predetermined.

    Failure to make adjustments

67. This complaint fails because we find that the respondent had neither actual nor constructive knowledge of the claimant's disability or that he was likely to be placed at a substantial disadvantage by the application format because of this.

    (1) The claimant did not tell the respondent that he had dyslexia or explain how the application format would, or was likely to, impact on him. The respondent therefore lacked actual knowledge of the claimant's disability and any substantial disadvantage arising from it which arose from the application format.

    (2) We have considered whether the respondent ought to have known about the claimant's disability and its impact so far as this related to the application format. We have found that the materials which were sent to the claimant and which he had access to explained the GIS policy and invited him to highlight any adjustments he needed in relation to the application process. The respondent was not on notice

that the claimant had a disability until he submitted his application form. Even then the claimant failed to tell the respondent about his dyslexia and how he felt it had impacted on his application. We do not find therefore that at the point when the respondent received the application form it had constructive knowledge of the claimant's disability or any disadvantage which arose from the application format.

68. Even had we found that the respondent had the requisite constructive knowledge we would not have found that it failed to comply with its duty to make adjustments. The claimant contends that the application format placed him at a substantial disadvantage because of his disability in that it prevented him from being the strongest candidate and therefore from being appointed into the role of Head of Technology Planning and Delivery.

    (1) We have found that the claimant was able to overcome two of the three PCPs he identified in relation to the application format so that they did not put him at a substantial disadvantage. Although we accepted that one PCP, the word limit, presented difficulties for the claimant, we have also found that the claimant failed to follow the guidance to candidates that only one example was required for each answer and that the information provided should be structured, for example, by reference to the STAR format. This is what led to his poor scores.

    (2) Had we been so required we would not have assessed that it was likely that had the respondent removed this word limit (and also put the questions on the same page as the corresponding answers on the application form, and permitted him to submit his answers or supporting information by audio file) the claimant would have been appointed into the role. Whilst we accepted that it was the claimant's genuine belief that he was the best candidate for the role we were unable to make an objective assessment on the evidence before us.

    (3) We would not therefore have concluded that these adjustments would have been likely to have prevented the substantial disadvantage contended for.

Postscript – The respondent's process failures

69. As a national organisation renowned for informing and advising members of the public on their legal rights the respondent was well-placed to adopt and apply best practice in its recruitment processes. We have identified poor practice by Mr Kay and Ms Fane who were both part of the respondent's senior management team:

    (1) Despite giving Mr Kane responsibility for recruiting into this important management role, the respondent failed to ensure that he was inducted and trained in relation to its recruitment and selection policy and GIS. Nor did Mr Kane take it upon himself to familiarise himself with these resources.

(2) Only Mr Kane conducted the initial shortlisting exercise. When he did so he failed to identify that the claimant's application was made under the GIS, he therefore failed to apply the GIS scoring exercise to the claimant's application. He did not conduct a scoring exercise in relation to any of the 37 candidates. Nor did he record and retain any evidence for his shortlisting decisions. He shortlisted candidates based on their CVs and not their application forms.

(3) When Mr Kane and Ms Fane completed their retrospective scoring exercise they neither recorded nor retained the rationale for the scores they gave the claimant.

70. We would emphasise that notwithstanding these process errors we have found that there was no discrimination for the reasons we have set out above.

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Employment Judge Khan – 20/11/2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.20/11/2020

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FOR EMPLOYMENT TRIBUNALS